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Supreme Court of the United States.

OCTOBER TERM, 1893.

No. 150.

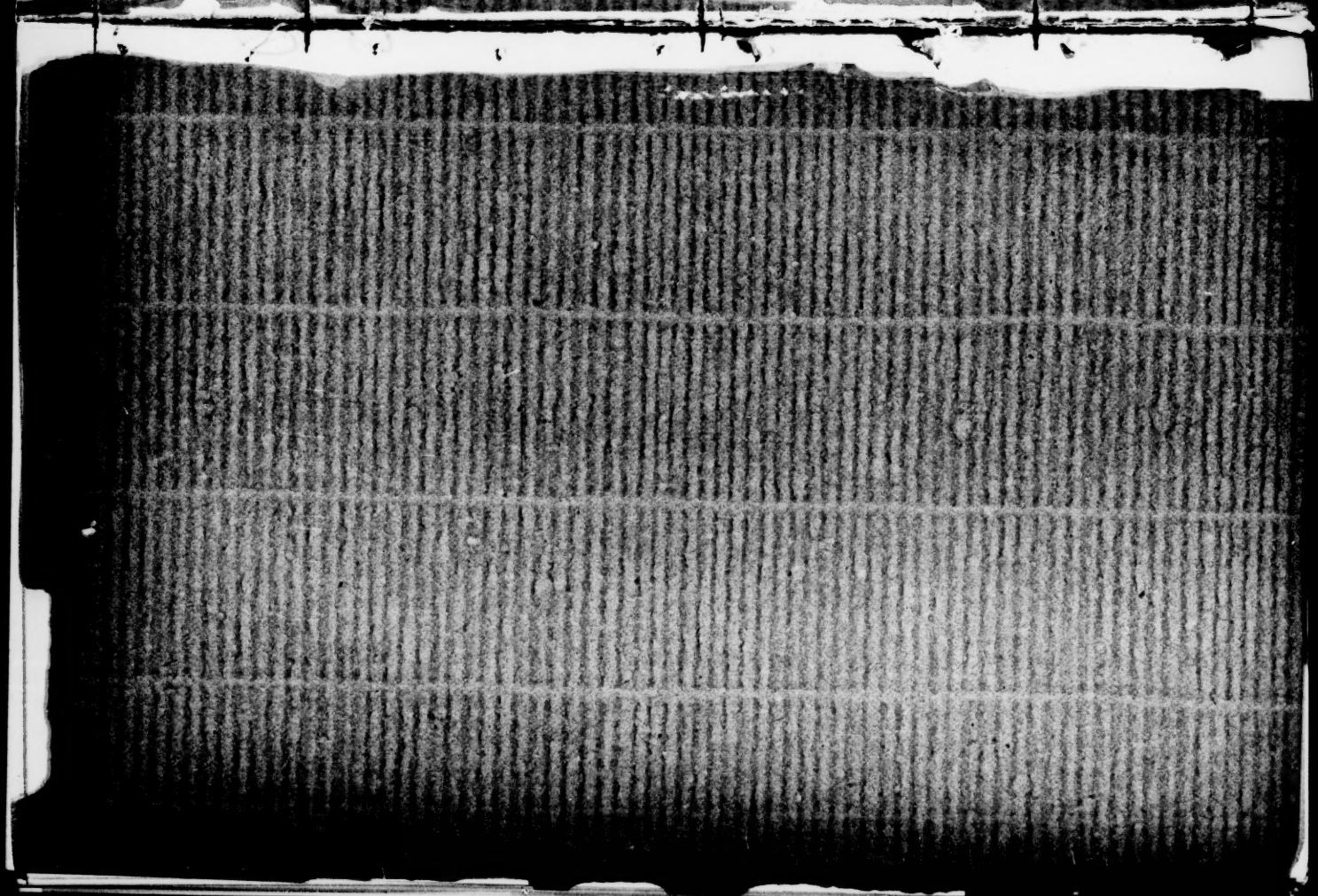
JOHN F. WOLLENSAK, *Appellant.*

vs.

SARGENT & COMPANY.

BRIEF FOR THE APPELLEE.

JOHN KIMBERLY BEACH,
Of Counsel.



Tuttle, Morehouse & Taylor, Law Printers.

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JOHN F. WOLLENSAK, *Appellant.*

vs.

SARGENT & COMPANY.

BRIEF FOR THE APPELLEE.

The appellant brought two suits in equity against the appellee in the District of Connecticut, for infringement of two re-issued letters patent. One case, based on re-issue No. 9,307, was heard upon pleadings and proofs, and his Honor Judge Shipman was of opinion that the re-issue was void for lack of patentable novelty.

The other case, based on re-issue No. 10,264, was heard on bill and demurrer for want of equity, and the demurrer was sustained.

Thereupon the two causes were consolidated by order of Court, and a final decree rendered.

> "That re-issued letters patent of the United
> "States, No. 9,307, issued to complainant, July 20,
> "1880, for an improvement in transom lifters, are
> "void so far as regards the third claim thereof (the

"only claim sued on); and that so far as* letters "patent of the United States, No. 10,264, are con- "cerned, the bill discloses no equitable cause of "action and the demurrer should be sustained."

Record, p. 124.

Both of these re-issues have been before this Court, and were examined in Wollensak vs. Reiher, 115 U.S., 87 and Same vs. Same, 115 U. S., 96.

In those cases re-issue No. 9,307 was held not to be infringed; and No. 10,264 was held, on demurrer to the bill, to be void, as to the claims relied on, for laches apparent on the record and not explained by the allegations of the bill.

In the present appeal the case as to No. 9,307 turns on the validity of the re-issue; infringement being admitted, unless a certain improbable construction of the claim shall prevail. As to No. 10,264, the same issue of laches again arises, but on a bill which undertakes to offer adequate excuses therefor.

RE-ISSUE No. 9,307 IS INVALID, FOR LACK OF PATENTABLE NOVELTY.

The only claim in issue is the third claim.

The subject matter of the patent is a transom lifter. A transom lifter is a common and very old contrivance for opening and closing an aperture which is not within reach of the hand. Fundamentally, it consists of a rod sliding in guides on the wall, and a link jointed thereto and attached to the transom, whereby the rectilinear motion of the rod is converted into a circular swing of the transom on its pivot.

The mechanism is evidently the same arrangement of jointed rod and link which has been used from time unknown to con-

* The word "re-issued" should be inserted.

vert rectilinear motion into curved motion and vice versa in pumps, steam engines, etc.

The specific improvement in this old mechanism, claimed by the patentee, consist in providing the upper end of the rod with a support and guide, and prolonging the rod beyond its junction with the link so as to support and guide the rod near its upper end.

This Court has so construed the claim, 115 U. S., 87, 94, saying,

> "But having reference to the state of the art at "the date of the alleged invention, the patentee "must be limited to the combination with a transom, "its lifting arm and operating rod, of a guide for the "upper end of the rod prolonged beyond the junc- "tion with the lifting arm so as to prevent the "operating rod from being bent or displaced by the "weight of the transom."

This too, is the declaration of the patent itself, which states that,

> "Transom lifters have heretofore been con- "structed with a long upright rod or handle jointed "at its upper end to a lifting arm which extends to "and is connected with the side or edge of the "transom sash, the sash being opened or closed by "a vertical movement of the long rod. When thus "constructed the upright rod is liable to be bent by "the weight of the transom, owing to the want of "support at or near the point of junction between "the long rod and the lifting arm."
>
> "The object of my invention is to remedy this "difficulty; and to such end it consists in providing "the proper support or support and guide for the

"upper end of the lifting rod during its vertical
"movements and while at rest.

Rec., p. 7.

There was a motion made for a preliminary injunction in these cases, and the opinion denying the motion is printed in the record at pp. 20–24. In that opinion Judge Shipman following the specification of the patent, and the judicial authority of this Court, says,

"The guide above the junction and the prolonga-
"tion of the rod constitute the improvement."

This was, indeed, the accepted construction of the patent, until the necessity of the case forced the complainant to attempt to shift his position and take new ground respecting the scope of the third claim.

The expert witness for the complainant put up the case for final hearing on the theory expressed in the following question and answer:

X. Q. 33. You have testified to the specific elements which are necessary in your judgment to the operation of the transom lifter described in the patent, and I understood you to state that you regarded the third claim of the patent as comprehending some details of construction not specifically mentioned in the claim. Will you please enumerate by reference to the descriptive letters, or in any other convenient way, the several elements which you find necessarily described in the third claim, leaving out all those things which you do not regard as being by necessary implication embodied in the combination stated.

A. The transom window T, the lifting arm and bracket A, the upright rod V, the guide G′ near the upper end; the guide G, *including set screw s*, near the lower end; an intermediate guide not lettered.

Thus instead of a claim of five elements; viz, (1) guide G′ arranged above the junction of the (2) lifting arm and (3) upright rod in combination with the (3) prolonged rod V, (4) guide G, and (5) arm A: we have a combination including also a set screw *s* an intermediate guide, and bracket A.

The interpolation of these elements is attempted on the theory that they are essential to the commercial success of the entire transom lifter described in the specification: but this will not justify the making of a new claim. A patentee is not required to include in a combination claim all the elements which go to make up the complete machine to which his improvement relates.

Loom Co. vs Higgins, 105 U. S., 591.

He may at his option claim combinations of elements fewer in number, and these are at once more comprehensive, and more vulnerable. But having elected to make a broad claim of fewer elements he is bound by it, and cannot resort to the specification to import into the claim, as defenses against the prior art, elements which he chose to omit therefrom lest they should unnecessarily restrict its scope.

White vs Dunbar, 119 U. S. 47.

Although the technical effect of importing additional elements into the claim is to restrict its scope, yet in the present case the additional elements would have the practical effect of enlarging the claim, because they would convert a claim for a specific improvement in transoms lifters, into a claim for the whole improved transom lifter.

Judge Shipman's opinion, after stating the new interpretation of the claim sought for, says:

> "The adequate answer to these suggestions is "that although it may be true that Wollensak's "actual invention included all the details of the "device except the rod and the lifting arm, and

"was a substantially entire transom lifter, yet that "his re-issued patent as it now exists not only does "not make such a broad claim, but confines itself "to the narrow limits which have been mentioned. "The patentee declared that his invention consisted "in providing the proper support and guide for the "upper end of the lifting rod. Upon that theory "the invention was presented to the patent office, "both in the application and on the appeal. The "obvious intent of the patentee and the language "of the patent unite in the construction which has "been heretofore uniformly given to it. The "Court cannot broaden the grant beyond the lim-"itations which the patentee has himself imposed "(Railroad Co. vs Mellon, 104 U. S., 112). The "effect of the construction asked for would be to "graft upon the claim an invention not previously "'indicated upon its face,' nor stated in the speci-"fication as one belonging to the patentee. (Day "vs Fair Haven Railway Co. 132 U. S., 98)."

(Rec., pp. 121, 122.)

The consideration last stated is especially controlling. It is not simply that the patentee omitted to claim what on the face of his patent he might have claimed; but that the thing which is now sought to be covered by the claim was described in the patent as if it were old.

We submit that the patentee must come back to the statement of what was *new*, as the utmost limit of any possible claim.

But if the claim is to be construed on the theory of the complainant's expert, defendants do not infringe.

If, in other words, it is essential to follow the peculiarities of construction shown in the drawings and described in the specification, then the defendant's device, which has no set screw, and no notches in the rod, and has a different construction of bracket, does not come within its description.

The patent describes a locking device which consists of a notched rod and screw to enter into the notches; while the defendant's device is a clamping apparatus which pinches the smooth rod between two brake shoes.

This latter device produces, to be sure, the effect of locking the transom, but it does it in a different way, and results in a different capacity; its operation is not that of a lock bolt intended to engage with a series of notches, and its effect is to lock the transom at any position instead of at a series of predetermined points only.

We shall touch on the question whether this improbable construction of the third claim will distinguish it patentably from the prior art; but as there seems to be no reason why this Court should depart from the construction which it has already put on the claim, we shall first discuss the issue of patentable novelty on the assumption that the substance of the alleged invention, is the additional guide in combination with the rod prolonged beyond its junction with the link or lifting arm.

Precisely this same combination of a sliding rod, prolonged beyond its junction with the link and provided with a guide and support at its prolonged end, is found in the patent to Bayley & McCluskey, No. 79,541, dated July 7, 1868, and printed at p. 6 of the Addition to Record.

Judge Shipman correctly describes this device in his opinion on the motion for a preliminary injunction.

"The Bayley and McCluskey patent of July 7, "1869 (should be 1868), which described an inven- "tion for opening and closing a series of railroad "passenger car ventilators or transoms. It con- "sisted of a long rod sliding horizontally in a series "of guides past the series of windows, and con- "nected with each window by a separate arm, so "that, by sliding the rod backward or forward, the "windows will be opened or shut. The device held "vertically, closely resembles the plaintiff's lifter. "This is not an anticipation of the patent in suit, "because there is no lifting of a window which "bears its weight upon the rod; and in order to "open a series of light ventilators by a horizontally "moving rod, the same precautions against the "bending of the rod are not required, which are "necessary to overcome the direct weight and pres- "sure of a heavy transom upon a rod which moves "vertically. The only fact which I now regard of "importance is that the inventor naturally extended "his rod beyond the end window, and beyond the "junction of rod with the lifting arm connected "with that window, and thus indicated that, given "a transom, or series of transoms, to be opened by "a long rod, moving horizontally or vertically, "which opens each transom by a lifting arm con- "nected therewith, there must naturally be an ex- "tension of the rod for a greater or less distance "beyond the junction, and a support for the end "of the prolonged rod."

Rec., p. 22.

It will be seen that Judge Shipman's opinion was based rather on the general proposition that "the strengthening and

support of the rod by means of its extension and its confinement within an additional metallic loop or eye, seem to be the obvious suggestions which would naturally occur to a mechanic;" than on a specific comparison with the Bayley & McCluskey device.

Stephenson vs. Brooklyn Crosstown R. R. Co., 114 U. S., 149, and Aron vs. Manhattan Railway, 132 U. S. 84, are cases relating to this same art of opening and shutting apertures at a distance from the hand of the operator, and they fully justify the conclusion that all these contrivances whether for operating window shutters, ventilators, sky-lights, omnibus and horsecar doors, sugar refinery windows, railway gates, or transoms, are in the same class, and that the adaptation of existing mechanisms within this class to any special use, is matter of ordinary mechanical skill.

Judge Shipman was therefore, quite right in relying upon the general proposition that no inventive skill was required to provide a support where a support was needed; but the lack of patentable novelty is in this case (as it always should be) capable of closer demonstration than a mere statement of opinion.

A comparison with the Bayley and McCluskey device will positively exclude any novelty of mechanical function or effect, from the combination stated in the claim.

The same prolonged rod, and guide beyond the junction of the rod and link, exists in each. The same generic function of resisting angular displacement is performed in each by these same devices.

The complainant's expert produced a model of the Bayley & McCluskey device called "Bayley & McCluskey No. 3;" saying, "the third model shows parts of the Bayley & McCluskey device as it would be applied to a door jamb to operate a transom. It show that it would not operate in that case."

Rec., p. 34.

But on cross examination the witness admitted that if the window of that exhibit were hinged at the other end, it would then operate: and the admission is quoted because it establishes beyond a doubt that the combination of the third claim is nothing but the Bayley & McCluskey mechanism turned into a vertical position.

"X. Q. 51. If the window of the Bayley & McCluskey model No. 3 was hinged at the other end, the model would then illustrate a practical transom lifter when turned into a vertical position, save only some device should be added to lock the transom at any desired angle would it not?

Ans. Yes; that is, it would operate, but probably it would not be salable." Rec., p. 42.

Manifestly, it makes no difference whether the device be used horizontally or vertically, since all its parts coöperate in the same way in either position. Neither is it material that in the one device the window was expected to swing outward, and in the other, inward; since this depends entirely on whether the window is hinged at one end or the other.

It is also immaterial whether the specific strain which the additional guide and prolonged rod are called upon to resist, is a strain due to friction, to wind pressure, or to the dead weight of the window; since in any case the prolonged rod and guide would receive and resist the strain without inquiring into its origin.

The case of the appellant, however, turns on the proposition that the improvement relates to a transom *lifter*, as distinguished from a transom *opener*; and for the sake of making this fanciful distinction it has been conceded that the patent is limited to the combination described when it is used in a *vertical* position.

X-Int. 46. Do you regard it of the essence of the third claim of the patent in suit, that it should be used in a vertical position?

Ans. Yes.

X-Int. 47. So that if the defendant's transom lifter were used horizontally, so as to open a transom swung sideways, it would not, then, be described by the language of the third claim of the patent in suit. Is that so?

Ans. It is, because it would not then be a transom lifter.

X-Int. 48. Is that the only reason?

Ans. Yes: I assume the devices to be otherwise identical.

Rec., p. 42.

From these several extracts from the testimony it is clear that the complainant's expert was practically compelled to admit the mechanical identity of the patented combination with the Bayley & McCluskey device; but sought to distinguish between the two: 1st, by importing additional elements into the claim; and 2d, because the patentee had put the combination to the specific use of *lifting* transoms.

The addition of the set screw and intermediate guide cannot add any force to the combination, even if it were permissible, for the set screw and intermediate guide are not described in the patent as inventions of the patentee, and they plainly operate in the same way whether the upright rod be prolonged or not.

Unless the patent is valid for the prolonged rod and upper guide, it cannot be made valid by the addition of old devices having no peculiar or uncommon function in the combination.

Consolidated Electric Co. vs. McKeesport Light Co., 40 Fed. Rep., 21.

Royer vs. Roth, 132 U. S., 201, 206.

Double Pointed Tack Co. vs. Two Rivers Mfg. Co., 109 U. S., 117, 121.

Neither will the fact that the patentee has put the combination to the new specific use of *lifting* transoms, as distinguished from *opening* transoms, help the claim.

In the very recent case of Knapp et. al. vs. Morss, decided by this Court Nov. 20, 1893, the doctrine that a patentee of a combination must stand on the novelty of the means or mechanical device, and not on the novelty of the use to which he puts it, was again affirmed, citing

Carter vs. Hyde, 16 Pet., 519.
LeRoy vs. Tatham, 14 How., 156.
Corning vs. Burden, 15 How., 252.
Barr vs. Duryea, 1 Wall., 531.
Fuller vs. Yentzer, 94 U. S., 288.

It is submitted that whether upon the general ground stated by Judge Shipman, or upon a specific comparison with the Bayley and McCluskey device, the re-issue No. 9,307 is invalid.

THE DEMURRER TO THE BILL BASED ON RE-ISSUE NO. 10,264, WAS PROPERLY SUSTAINED.

The decision of this Court in Wollensak vs. Reiher, 115 U. S., 96, proceeds on the familiar rule that when the bill discloses apparent laches, it must also present adequate excuse therefor.

The original of this re-issue was dated March 10, 1874; the application for the re-issue was filed May 31, 1882.

The bill attempts to account for this delay of eight years.

The bill states (Rec., p. 10, fol. 15), "that upon discovering the mistake in his original patent" the complainant wrote to his solicitors. There is no disclosure of the date when he discovered the mistake, nor of the date of the letter to the solicitor.

It is alleged that some delay, described as "considerable," was occasioned by the illness of his solicitor; but the first date of any action taken in the matter is that of a letter from the solicitor advising him *not* to take a re-issue. The date of this letter is given as April 9, 1878.

Thus the bill offers no excuse or explanation of a lapse of time, which, allowing for the "considerable" delay above referred to, amounted to about four years.

This of itself is unreasonable because not explained.

Relying on the above advice of counsel, it appears from the bill that a second period of four years elapsed *after* the discovery of the alleged mistake, before the application was filed.

This amounts to a positive admission of laches.

The patentee deliberately elected not to apply for a re-issue until four years after he discovered the mistake. It is of no importance that his conduct was based on the advice of a solicitor; and it is immaterial whether the advice was good or bad. The point is that for reasons which then seemed sufficient, and with the knowledge of the mistake, the patentee failed to exercise the right of correction for a period which this Court has held to be unreasonably long even when the alleged mistake was claimed not to have been discovered.

Ives vs. Sargent, 119 U. S., 652.

The facts stated in the bill when closely examined amount, indeed, to a deliberate abandonment of the right to re-issue this patent in favor of a supposed right to re-issue another patent, of earlier date, so as to cover broadly an underlying invention.

"His said solicitors advised your orator by a "letter dated April 9, 1878, not to apply for a "re-issue of said patent No. 148,538, *but to apply* "*for a re-issue of a patent previously issued to* "*your orator for an improvement in transom lift-*"*ers: to wit, patent No. 136,801,*" *etc.*

Rec., p. 10, fol. 15.

The preferred re-issue was obtained, and was pressed on the Court in Illinois as a valid re-issue covering (as the bill admits) the very improvements now sought to be covered by the present and later re-issue, but without success.

It was only after and because of the failure of this attempt to re-issue patent No. 136,801 so as to cover the underlying invention, that the attempt was made to re-issue patent No. 148,538 to cover the same thing.

The excuse offered by the bill is simply that the patentee abandoned his right to correct the mistake in patent No. 148,538; and preferred to speculate on the chance of including the omitted claims in a re-issue of patent No. 136,801; that this speculation has failed, and that he ought therefore to have another chance.

There is no merit in the excuse.

A patentee cannot shift the legal duty of seasonably applying for correction of mistakes in his patent, upon the shoulders of counsel.

Powder Co. vs. Powder Works, 98 U. S., 126.
Ives vs. Sargent, 119 U. S., 652, 662.

Inasmuch as the bill does not charge infringement of any claim contained in the original patent, but only of certain claims appearing for the first time in the delayed reissue; no equitable cause of action is stated in the bill.

The decree should be affirmed as to both reissues.

JOHN KIMBERLY BEACH,
of counsel for Appellees.

Office Supreme Court U. S.
FILED,
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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1893.

THE STATE OF IOWA *vs.* THE STATE OF ILLINOIS.	ORIGINAL SUIT. IN EQUITY.

MOTION PAPERS ON APPLICATION OF THE STATE OF ILLINOIS,

TO SET ASIDE ORDER

CONFIRMING COMMISSIONERS' REPORT.

M. T. MOLONEY,
ATTORNEY GENERAL OF THE STATE OF ILLINOIS.

A. W. GREEN,
HENRY S. ROBBINS,
OF COUNSEL.

BARNARD & GUNTHORP, PRINTERS, CHICAGO.

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IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

Now comes the defendant, the State of Illinois, and makes application to the court for leave to move the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners appointed to ascertain and mark the boundary line between the State of Illinois and the State of Iowa, as is more fully stated in the annexed motion. Said application is based upon the petition filed herewith, and the affidavits attached thereto, and the brief filed herewith.

M. T. MOLONEY,
Attorney General, State of Illinois.

A. W. GREEN,
HENRY S. ROBBINS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa
vs.
The State of Illinois.

Now comes the defendant, the State of Illinois, and moves the court to set aside the order entered herein on the tenth day of April, 1893, confirming the report of the commissioners filed on the thirtieth day of March, 1893, wherein said commissioners ascertained and marked the boundary line between the state of Illinois and the state of Iowa at the Keokuk and Hamilton bridge at Keokuk, Iowa, and in support of said motion said defendant, the State of Illinois, files the petition and affidavits hereto annexed, and also the brief filed herewith.

M. T. MOLONEY,
Attorney General of the State of Illinois.

A. W. GREEN,
HENRY S. ROBBINS,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

The defendant, the State of Illinois, respectfully represents to this court that the subject matter of this suit was the ascertainment of the boundary line between the states of Iowa and Illinois; that on January 3, 1893, an interlocutory decree was entered herein, wherein it is ordered, adjudged and declared by this court that the boundary line between the state of Iowa and the state of Illinois is the middle of the main navigable channel of the Mississippi River at the places where the nine bridges mentioned in the pleadings cross said river; and it is further ordered that commissioners be appointed to ascertain and designate at such places the boundary line between the two states, such commissioners consisting of three persons to be named by the court on the suggestion of counsel, and to be required to make a proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and to report the same to the court for its further action.

This petitioner further shows that on March 6, 1893, a joint request for the appointment of commissioners to fix the boundary line on the Keokuk and Hamilton bridge was presented to this court asking for the appointment of Montgomery Meggs, John R. Carpenter and Albert Wempner as such commissioners; that in pursuance of such joint request an order was entered on March 7, 1893, appointing the above named persons commissioners to locate and mark the boundary line between the said states at the Keokuk and Hamilton bridge, and report at once their action in

that regard before proceeding to ascertain the line or mark the same at the other bridges, and that afterward they determine and mark the said state line at the other eight bridges, as requested by either party, and report the same. That on March 30, 1893, the said commissioners filed their report in writing in this court, wherein they reported that they had fixed the boundary line between Iowa and Illinois on the Keokuk and Hamilton bridge at Keokuk, Iowa, and that they find that said boundary line is situated one thousand and forty-one and 65/100 feet east of the center of the draw span, and submitted with their report a plat showing their measurements along the bridge; that on April 10, 1893, upon the application of the state of Iowa, an order was entered by this court confirming said report.

Your petitioner further shows that at the time that the joint request for the appointment of commissioners was signed by the Attorney General of Illinois, a change of state officers had just taken place in the state of Illinois, and the said Attorney General, who signed said joint request and who also signs this petition on behalf of the state of Illinois, had been but a few days in office, and was not at all familiar with the proceedings in this cause; that said joint request was presented to him by Mr. George Edmonds, a practicing lawyer of the state of Illinois.

Your petitioner further shows that no notice was ever given to its attorney general, or in any way to the state of Illinois, that the said commissioners had made their said report, or that an application would be made to this court to confirm any report of said commissioners; that not until after the final adjournment of this court at its last term did the attorney general of the state learn that a re-

port had been made by the said commissioners, and that said report had been confirmed.

Your petitioner further represents that the said commissioners either must have wilfully disregarded the decision and the interlocutory decree of this court, or have totally misunderstood the same. That by their report the commissioners marked the boundary line between the two states at a point midway between the west bank of the river and the east bank of the river; that this fixes the boundary line substantially at the place contended for by the State of Iowa; that the State of Iowa claimed that the middle of the main body of water of said river was the boundary line irrespective of where the navigable channel or channel of commerce might be; that the State of Illinois claimed that the boundary line was the middle of the main navigable channel, which was and is the channel of commerce. The decision of this court, after considering both contentions, decided that the controlling consideration is that which preserves to each state the right of navigation on the river, and that therefore the boundary line is the middle of the main navigable channel and in its interlocutory decree declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River.

This petitioner further states that the main navigable channel of the Mississippi River, as appears from the affidavits hereto attached, is near the Iowa shore; that the west line of such channel is near where the pivot pier of said Keokuk and Hamilton bridge now stands, and the said channel extends eastward a distance of about four hundred feet; and that the middle of that channel is, under the decision of this court, the boundary line between the two states; that this line is at least eight hundred feet west of the

line as fixed by the said commissioners; that at the point fixed by said commissioners the river is not navigable, and never has been navigable in the ordinary stage of water for vessels engaged in the carrying trade upon said river, nor in fact has the portion of said river, east of the portion of the said river above mentioned as the navigable channel thereof, been a part of the navigable channel of the river nor used by said vessels for the purposes of navigation, as more fully appears by the affidavits hereto annexed.

Wherefore your petitioner, the State of Illinois, prays that the said order of April 10th, 1893, confirming the report of said commissioners, may be set aside, and that new commissioners may be appointed to mark said boundary line in accordance with the decision of this court, or, that this cause be referred to some Circuit Court of the United States or a Master in Chancery thereof to take proof in regard to the main navigable channel of the Mississippi River and the middle line thereof, and report the same to this court.

And your petitioner will ever pray, etc.

M. T. MOLONEY,
Attorney General of State of Illinois.

A. W. GREEN.
HENRY S. ROBBINS.
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

STATE OF ILLINOIS,
COUNTY OF COOK. } ss.

J. L. Miller, being duly sworn, doth depose and say as follows:

I am, and for four years last past, have been a practicing lawyer in the state of Illinois, residing and practicing in the city of Hamilton, in Hancock County, in the said state of Illinois; that in 1891 litigation arose between the Keokuk and Hamilton Bridge Company on the one side, and the City of Hamilton, the Township of Montebello, in said Hancock County, and School District Number Three of said Township, in regard to the assessment made on property of the Bridge Company, in said municipal corporations, for the purposes of taxation, and I was employed by such corporations to assist on their behalf in such litigation. The main question in such litigation was the same question that is made by the pleadings in this suit, namely, the location of the boundary line between the state of Illinois and the state of Iowa. The first suit was a suit brought by a stockholder of the Bridge Company against John W. Bertschi, County Treasurer and ex-officio Collector of Hancock County, and William L. Guthrie, Assessor of Montebello Township, to restrain the collection of the taxes of 1890, the main allegation in the bill being that the Township Assessor had assessed property of the Bridge Company in the state of Iowa, the contention being that the boundary line was

midway between the shores, and the Township authorities claiming that the boundry line was the middle of the channel of commerce, which was many hundred feet west of the center line between shores. That bill was dismissed.

Shortly thereafter, the Keokuk and Hamilton Bridge Company filed another bill against the same parties, in the Circuit Court of Hancock County, for an injunction, making the same claim as to the boundary line, and the defendants making the same defense. A temporary injunction was granted as prayed for in the bill by the Judge of the Circuit Court. From the order granting such injunction an appeal was prayed to the Appellate Court of the State of Illinois for the Third District, and upon that hearing a decision was rendered reversing the order for an injunction and holding in accordance with the contention of the Township authorities, a copy of which opinion is hereto annexed.

In all that litigation the counsel for the Bridge Company was Mr. George Edmonds, a practicing lawyer of the state of Illinois.

In regard to this suit, I have made inquiries in regard to its institution and conduct, with the following result: I have made inquiries of Mr. James C. Davis, whose name is signed to the original bill in this case as counsel, and have learned from him that he was employed in the case by Mr. Edmonds, and that he was paid for his services by the Keokuk and Hamilton Bridge Company, and that he understood the expenses of the suit, including the payment of the commissioners who were appointed to fix the boundary line by the order of this court, were paid by the Bridge Company. I also made inquiries of Mr. John Y.

Stone, Attorney General of the State of Iowa, whose name is signed to the bill, and learned from him that he knew nothing about the case, except that he filed the bill and the answer, and I was told by Mr. Stone that none of the expenses of the suit had been paid by the State of Iowa.

In looking over the record of this case, I have ascertained that a motion was made on March 30, 1893, by the State of Iowa to confirm the report of the commissioners appointed to determine and mark the boundary line between the states of Iowa and Illinois on the Mississippi River at the Keokuk and Hamilton bridge, and that said motion appears to be signed by J. H. Cole and Walter I. Hayes as attorneys for plaintiff; that J. H. Cole is and for some years last past has been the superintendent of the Keokuk and Hamilton Bridge Company.

I have also learned from other sources that the compensation and expenses of the commissioners to fix the boundary line were paid by the Keokuk and Hamilton Bridge Company.

In the above mentioned suit in the state court, Albert Wempner made an affidavit, a certified copy of which is hereto annexed, the original being on file in the office of the clerk of the Circuit Court of Hancock County, and he is the same Albert Wempner who was one of the commissioners appointed to fix the boundary line, and who signed the report as one of such commissioners fixing the boundary line which is a part of the record in this case.

On September 5, 1893, I met John R. Carpenter, one of the commissioners appointed by this court to mark the boundary line between the two states, and had a conversation with him. In that conversation said Carpenter

stated that under the decision of this court the middle of the navigable channel was not the boundary line, that while the commissioners could not be very certain what the court meant by its decision, they decided that the boundary line should be the middle of the main arm of the river without any reference to the portion thereof that was used as the channel of navigation. He also informed me that the Keokuk and Hamilton Bridge Company had paid the expenses of the commissioners.

J. L. MILLER.

Subscribed and sworn to before me this 21st day of September, A. D. 1893.

[SEAL.] JENNIE MULLEN,
Notary Public,
Cook County, Ill.

STATE OF ILLINOIS. APPELLATE COURT—THIRD DISTRICT.

At an Appellate Court, begun and held for the Third District of the State of Illinois, at Springfield, on the Third Tuesday in November, A. D. 1891.

Present:

Hon. GEO. W. WALL, *Presiding Justice.*
Hon. GEO. W. PLEASANT, *Justice.*
Hon. CARROLL C. BOGGS, *Justice.*

To wit: On the 3d day of December, A. D. 1891, there was filed in the office of the Clerk of said Court an opinion of said Court, in the words and figures following:

John W. Bertschi, Treasurer, &c., and William L. Guthrie, Assessor, &c.,
Appellants,
vs.
The Keokuk & Hamilton Bridge Company,
Appellee.
} *Appeal from Hancock.*

STATE OF ILLINOIS, APPELLATE COURT, THIRD DISTRICT. MAY TERM, 1891, FILED.

John W. Bertschi, County Treasurer, and *ex officio* Collector of Hancock County, and William L. Guthrie, Assessor of Montebello Township,
Appellants,
vs.
The Keokuk and Hamilton Bridge Company,
Appellee.
} *Appeal from Hancock.*

PLEASANTS, J.:

This is an appeal from an interlocutory order granting an injunction against the collection of the taxes for the year 1890, levied for state, county and other purposes, upon appellee's bridge across the Mississippi river between the cities of Hamilton, Illinois, and Keokuk, Iowa.

Appellee questions the jurisdiction of this court on the ground that the case relates to revenue.

That such is its character is clear from *Potwin* v. *Johnston*, 106, Ill., 532, and *Herhold* v. *City of Chicago*, *ibid.*, 547; and section 88 of the Practice Act declares that in such cases, among others there mentioned, the appeal "shall be taken "directly to the Supreme court." The jurisdiction of this

court is appellate only, and until July 1, 1887, could be exercised only upon "final judgments, orders or decrees." This is so expressed in all the statutory provisions defining its jurisdiction, except the section above referred to. That section however is to be taken in connection with Sec. 67 as containing the exceptions therein referred to, and since the rule stated in Sec. 67 relates to final orders only, so must the exceptions stated in Sec. 88. But the act of June 14, 1887, conferred upon the Appellate courts jurisdiction on appeal from "an *interlocutory* "order or decree entered in *any* suit pending in any court "in this state granting an injunction." Thus, if the order is "interlocutory" and grants an injunction, the jurisdiction is plainly conferred, whatever may be the character of the "suit" or case.

It is further said that this act is unconstitutional, but no reason is suggested in support of that proposition, nor do we see any ground on which its validity can be held to be really in question.

Upon the merits the bill claims that the assessment was fraudulently made excessive and that a large part of the property included in it was fixed in the State of Iowa. The description was of "all the lands of The Keokuk and "Hamilton Bridge Company situated in Hancock county, "Illinois, and lying and being in and on Island No. 4, in "the south-west quarter of section thirty (30), in town-"ship five (5) north, range eight (8), west, in said "county, and extending westwardly into the Mississippi "river to the state line between the States of Illinois and "Iowa and more particularly described as follows, viz: "a strip of land eighty feet wide, more or less, the center "line of said strip of land commencing at a point in the "center of Railroad avenue in the plat of ground known

"as the Keokuk and Hamilton Ferry and Manufacturing "Company's Addition to the city of Hamilton, in said "county, 707¾ feet south, 72 degrees 40′ east of the "center of the east end of said bridge, thence running "north 72 degrees 40′ west to the east end of said bridge, "thence continuing the same course along the center line "of said bridge to the State line between the states of Illi- "nois and Iowa, including the slope walls, embankments, "abutments, piers and bridge structure and improvements "thereon, in Sec. 30, T. 5, R. 8." It was assessed by the town assessor at $95,000, which the Board of Equalization reduced to $92,150, and the taxes extended thereon amounted to $3,087.02.

The bill avers that the bridge was completed in June, 1871; that the fair cash value of all that part of it situated in Illinois was not on May 1, 1890, nor has been since, over $60,000, and that the assessment included at least 716 feet, and as complainant believes, over 900 feet of it in Iowa. Affidavits were filed in support of the bill, and not directly contradicted, setting forth the actual cost of portions of the bridge and estimates of the cost in 1890 of other portions, and of steel bridges which tended to show that the part in Illinois, of the same kind, or of steel, and of considerably greater strength, could have been constructed in 1890 for $90,000, and others to the effect that real estate in the town of Montebello was generally assessed at one-third of its estimated cash value or less.

But as the Supreme court say in *Pacific Hotel Co.* v. *Lieb*, 83 Ill., 609, "the value of property is a matter of "opinion, upon which different minds, with equal oppor- "tunities of knowledge and actuated by the same honest "desire to arrive at the truth, are liable widely to differ."

This is especially true where, as in that case and here, the property is used in connection with a franchise which is practically a monopoly. It may be out of all proportion to its cost, and not ascertainable by comparison with other property because of its peculiar character. It is averred in the answer under oath and not denied, that the bridge company has a capital stock of $1,000,000, and a large bonded indebtedness, and that the bridge with its appurtenances is substantially all the tangible property it owns or ever did own. What income it yields complainant has not seen fit to show. It appears that appellant Guthrie was the Township Assessor from 1882 to 1885, inclusive, and in each of those four years assessed this same property, including what is now claimed to be in Iowa, at $125,000. The bill in effect admits that the part conceded to be in Illinois is worth $60,000, and avers that the part assessed which is claimed to be in Iowa, is the most valuable part of the structure, excepting the draw, but does not state its value. This part may be a third or half of the bridge proper, and for aught that is averred may be worth "over" $35,000; and unless it appears that Guthrie knew or believed it was in Iowa, the alleged excessiveness of the assessment, as bearing upon the question of its honesty, is to be considered upon the assumption that it was in Illinois. The assessments of 1882 and 1884 were raised by the Board of Equalization to $126,250; that of 1883, was reduced to $120,000; and that of 1885, to $116,250. Those of 1886-7-8, not shown, were equalized respectively at $117,500, $112,500 and $115,000. Neither of these assessments was objected to by the Bridge Company, and the taxes extended on them as equalized, were paid in full without complaint. It is not

claimed that this acquiescence estops objection to the assessment here in question, but it certainly tends to show that the complainant did not think those previously made fraudulent or grossly excessive, and did think all the property included was in Illinois, or else that the part now conceded to be in Illinois, was properly so assessed. Still, further, the assessment here in question was objected to by the company's agent before the town board of review, and again before the board of supervisors; and those boards after hearing him fully—the one unanimously and the other with only two members dissenting—refused to reduce it. The effect of this action, as evidence, is met with the simple averment that these boards also in thus refusing acted fraudulently.

If, upon all this evidence, it should be conceded that the assessment was at all excessive, we cannot think it so clearly and grossly so as of itself to show fraud. The charge of fraud, based upon that ground, allows too little for honest differences of opinion, includes too many persons presumably honest and sensible, and apparently without any appreciable interest to commit or approve it, and confesses too much unexplained indifference of complainant for a series of years to alleged rights and interests which were hardly less clear and important then than now. Such concession would therefore be of no avail in this proceeding.

For it is settled that mere excessiveness of an assessment will not authorize a court of chancery to interfere with it. The power to assess is given to the assessor. In exercising it he acts judicially, and his honest misjudgment can be corrected only by the town board of review if the assessment is made before the fourth Monday of June, or by the board of supervisors, if made after

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that date. *Porter* v. *Railroad Co.*, 76 Ill., 595; *Ottawa Glass Co.* v. *McCaleb*, 81 *id.*, 560; *People* v. *Big Muddy Iron Co.*, 89 *id.*, 116; *Gage* v. *Evans*, 90 *id.*, 569; *Buttenuth* v. *St. Louis Bridge Co.*, 123 *id.*, 540. These cases and others cited in them, hold that the overvaluation, to warrant the interference of chancery, must be fraudulent.

In *Connecting Ry. Co.* v. *The People*, 119 Ill., 184, the refusal by the court below of an offer to prove it fraudulent by the mere fact and degree of its excessiveness was approved, and the general rule applied, "that "fraud being a conclusion of law, it is therefore incum-"bent on the party who would set it up to state the facts "relied upon as constituting it."

While the posibility of a valuation so grossly out of the way as thereby to show it could not have been honest has been recognized, *City of Chicago* v. *Burtice*, 24, Ill., 489; *Pacific Hotel Co.* v. *Lieb*, and *Gage* v. *Evans*, *supra*, the actual occurrence of such seems to be unknown to the courts.

Besides those going to show that this assessment was excessive, the only facts alleged as tending to show it was fraudulently made so are, (1) that while Guthrie was assessing the property of the town the agent of the company stated to him the condition, length and value of said bridge in Illinois as including less than 1,100 feet, and exhibited to him sales of quite a number of parcels of real estate in the town of Montebello as showing its value, and that the assessment of the same was less than one-third of such value; (2) that the assessors of the several towns in Hancock County, at their meeting held on April 30, 1889, agreed to assess real estate at eight per cent. less than it was assessed in 1889, and that the bridge was as-

sessed in that year at $75,000; (3) that said Guthrie assessed the bridge to the east end of the draw, but refused to make his description so show, and (4) that he knew the east end of the draw was many feet west of the state line.

It is not denied that he assessed the bridge to the east end of the draw, nor that other real estate in the town generally was assessed at no more than one-third of its fair cash value.

But whether the sales referred to in the first of these averments were for cash, or on what terms, does not appear; nor does the value of complainant's land, exclusive of the improvements, nor the aggregate value and assessment of real estate in the town.

The bridge may have been assessed in a larger proportion to its fair cash value than were a dozen or twenty other parcels of real estate selected, and yet in no larger than that of the aggregate assessment to the aggregate value of such property in the town. Guthrie denies under oath that the alleged statements and exhibits were made to him before the meeting of the town board of review on the fourth Monday in June, 1890, but admits they were then made to that board and afterwards to the supervisors. But if made to him before the assessment was returned, he may for reasons already suggested and possibly others, have differed in opinion from the agent as widely as their figures show in respect to the value of this property. He swears he assessed it at what he believed to be its fair value in comparison with the assessment of other property in the township, and with the aggregate assessment, and though he may have erred in judgment, we see nothing in this averment or the proof relating to it—considered in connection with

the opposing circumstances mentioned—to induce the belief that he acted with a fraudulent purpose.

As to his alleged disregard of the agreement stated of Apl. 30, 1890, the proof is that this property was assessed by the township assessor in 1889 at $115,000, and that the town board of review refused to reduce it, but that the board of supervisors did assume to change it to $75,000, though without any authority so to do, since the assessment was made before the fourth Monday of June. *Coolbaugh* v. *Huck*, 86 Ill., p. 605, and cases cited *supra*. From the action of the town and county officers in 1890, we think the fair inference is that they all understood the agreement of April 30, to refer to the assessment of 1889 as made by the township assessor, and with that understanding Guthrie fully complied by reducing the amount from $115,000 to $95,000.

The good faith of his description of the property assessed as extending "to the state line" instead of the east draw, would seem to be sufficiently shown by the fact that it was the same that was used in each of the years from 1882 to 1888, inclusive. What it was in the assessment of 1889, when objection was first made by the company, does not appear. We, therefore, presume it was still the same. Nor was it shown that Guthrie was asked to change it in 1890. That request was made of the board of supervisors.

There is no evidence in the record tending to show that Guthrie understood or supposed the state line was east of the east end of the draw. The exact location of that line was matter of opinion. It was not distinctly visible, nor were the data from which it was to be ascertained agreed on. Complainant with the same means of knowledge, shows itself uncertain of it by two hundred feet or more,

and is, therefore, hardly in condition to charge that the assessor knew it.

But if it is now ascertained to be in fact east of the draw, then, whether the assessor was or was not honest in assuming it to be where he did, his assessment of what was between that line and the draw was unauthorized, and the collection of the taxes extended thereon should, for that reason, he enjoined.

Where, then, is that line? The Act of Congress of Apl. 18, 1818, to enable the People of the Territory of Illinois to form a state, prescribed for its western boundary a line "along the middle of that river"—the Mississippi—and each of the state constitutions since adopted described it in the same language. It must, therefore, be presumed that the people accepted that boundary as Congress intended it. What, then, did Congress mean by "the middle of the river"?

A river, as defined by Webster, is "a large stream of "water flowing in a channel on land towards the ocean, a "lake, or another river," a definition which makes the the river one stream of water, and consequently the channel one strip of land. This is true of them as to their course in general, and where it is so, the middle of the river would doubtless be the line midway between the water lines at the ordinary stage on the opposite shores. But rivers are in fact, at some points, for short distances, separated into two or more streams, and thence while the river remains one, each stream has its separate channel, for a channel, according to the same lexicographer, is "the bed of a stream."

Now, whatever the rule of municipal law applicable to riparian owners may declare to be the middle of the river

at such points, it seems to be settled by the international rule that as to states having for a common boundary a navigable river, it is not the line midway between the main shores, but a line along the middle of the main one of these channels; and that is held to be the one best adapted and mainly used for navigation—the channel of commerce. It is obvious that no other line as a boundary would certainly secure to either state the right to any valuable use of the river for purposes of commerce, since the channel of commerce would fail to reach it, or would often cross and recross it. Nor would any other channel be a continuous channel. The reasonable presumption is that neither state would intend to concede to the other the exclusive right to use that channel, and upon that presumption the rule is founded, as is agreed by all the writers on international law. Wheaton, Sec. 200; Creasy, Sec. 231; 1 Hallack, Sec. 23, cited by counsel, and *Butternutt* v. *St. Louis Bridge Co.*, 123 Ill., 535, citing further, Field, Polson and Woolsey.

The Mississippi is such a river. At Hamilton, where the bridge crosses it, the continuity of its water surface at the ordinary stage was broken by Island No. 4. That part of the river which flowed between the island and the main shore in Illinois was not navigable for vessels generally at that stage; but that passage was, nevertheless, one of the channels at that point, and the island was within the general bed of the river. According to the showing of the bill, the distance from the main shore in Illinois to the west shore of the island, is 808 feet; from the west shore of the island to the Illinois abutment, 750 feet; thence to the Iowa abutment, 2,192 feet, and thence to the main shore in Iowa, 250, making in all, from main shore to main shore, 4,000 feet. The draw extends from

the Iowa abutment east 380 feet. The assessment to the east end of the draw then included 1,370 feet of the bridge west of the line midway between the main shores, 966 feet west of the line midway between the island and the Iowa shore, and 716 feet west of the line midway between the abutments; and if either of these midway lines is "the middle of the river" in the sense of the enabling act, it included a very considerable portion of the bridge that was in Iowa. No mention is made of a channel of commerce, nor is the bill positive as to which of the last two lines mentioned is the boundary, but avers that complainant believes the assessment included over 900 feet of the bridge in Iowa, and counsel in argument say: "On "the part of appellee it is claimed that the authorities of "Illinois can only tax said bridge to the state line, the "middle of the main river, between the Iowa shore and "the Illinois shore on Island No. 4." This claim seems to concede that the true line is not the middle of the river as a whole. "The main river" is not a strictly accurate expression, since there is only one; and we understand counsel to intend by it the main stream, and by that the one in which the largest of the parts of the river so divided flows, the test of mainness being not depth nor width, but quantity of water of unbroken surface.

If each of the beds in which the several unbroken streams at Hamilton respectively flow is to be regarded as only one channel, then the one between the island and the main shore in Iowa is certainly the main one, and in a general sense each is a channel, for each and the whole of each is the general bed of a stream which is unbroken at its surface, and, therefore, one stream. But a channel, in a more special if not a truer sense, may consist of only a part of such a bed. Webster's definition of it is

"the bed of a stream of water, especially the deeper part "of a river or bay where the main current flows." This distinction between the general bed and the channel is fully recognized by law writers and judges, to some of whom reference has already been made. In Angell on Water Courses, as cited for appellee (Sec. 10, Note 2), it is said that in ascertaining the thread of the river, and thereby the rights of riparian owners, "it will be proper "to take the middle line between the shores upon each "side without regard to the channel or lowest and deepest "part of the stream." See, also, Sec. 101 a. In *Bridge Co.* v. *County of Dubuque*, 55 Iowa, 558, it is said that "the word channel, when employed in treating subjects "connected with the navigation of rivers, indicates the "line of the deep water which vessels follow"; and in *Butternutt* v. *St. Louis Bridge Co.*, 123 Ill., 547-8, our own Supreme court declared this to be "a very accurate "definition of the word 'channel' as commonly used by "rivermen." And Wheaton says (Sec. 202, page 301), "The channel of the Mississippi was remarkably wind-"ing, crossing and recrossing perpetually from one side "to the other of the general bed of the river."

It is shown here that this channel, between Hamilton and Keokuk, was wholly west of the middle line between the main shores or between the island and the Iowa shore; that its west line was about where the pivot pier now stands and its width was about 350 feet, which would place the east end of the draw east of its middle line, and clearly in Illinois, if that line is the boundary. The only change in this channel since the bridge was built is its extension westward to the Iowa abutment, which was made by blasting and removing the rock-bed. No part of the river east of it was ever used as a channel by vessels engaged in the carrying trade.

Thus the line claimed by appellee to be "the middle of "the river," and therefore the boundary of the State of Illinois, would place the whole of the only navigable channel outside of that state and within the coterminous State of Iowa.

It is thought that the history and use of this phrase—"the middle of the Mississippi"—throws some light upon the meaning of Congress by it in the enabling act.

France was the first owner, by appropriation, of the Mississippi and all the territory of its tributaries. By the treaty of Paris of 1763, France ceded to Great Britain all her territory east of that river and north of the Iberville, and the two powers fixed the boundary between them by a line drawn along "the middle of the river Misis-"sippi." Being independent states, to whom the right to use the river for all the purposes of commerce, was of like importance, and which neither would get by the adoption of any other line, the presumption would be according to the authorities cited that they intended the middle line of the channel of commerce. November 30, 1782, Great Britain ceded to the United States all the territory thus acquired north of the thirty-first degree of north latitude, bounded on the west "by a line drawn "along the middle of the Mississippi river," and ratified the cession by the Treaty of Peace of September 30, 1783. This government must be presumed to have known the understanding between Great Britain and France in respect to the boundary, and by the use of the same language to describe it, to have accepted the territory with that understanding. It was also interested, like its grantor, equally with the coterminous state in the navigable use of the river. It must therefore have intended to

obtain, and understood it did obtain, half of the navigable channel without regard to any other middle line.

In 1798 Congress established the Territory of Mississippi, bounding it "on the west of the Mississippi," and in 1817 it was admitted into the Union as a state, with its west boundary "up the Mississippi river;" but Congress did not mean by that language to change the boundary as fixed between France and Great Britain, and between Great Britain and the United States. By "the river," was meant a line along the middle of the river.

Morgan & Harrison v. *Reading*, 3 Sm. and Marshall, 366.

In fixing the eastern boundary of Missouri the enabling act of March 6, 1820, used more definite terms –a line "down and following the course of the Mississippi in the "middle of the main channel thereof." That Congress here meant by "the middle of the main channel thereof," the same thing that it meant by "the middle of the river" is clearly evident from its use of the latter description in the enabling act for Illinois—the eastern boundary of Missouri by one description, and the western boundary of Illinois by the other being for a long distance the same. The east line of Iowa, also a coterminous state, is described like that of Missouri, and the west line of Wisconsin is a line "down the center of the main channel "of that river to the northwest corner of the State of Il- "linois"—which certainly places that corner in the center or middle of the main channel; and the main channel, for all the purposes of this case, was the channel of commerce.

Such appear to be the reasoning and conclusion of the Supreme Court in the Buttenuth case, 123 Ill., 535.

By several early acts of Congress, the equal right of every state of the Union, and of all the people of each to navigate every river within the United States was fully secured. And hence it is said the reason for the rule of international law that makes the line along the middle of the channel of commerce the boundary between independent states does not exist here.

But the claim here made of that line is not upon that reason. It is based upon acts of Congress, ratified by the People of the states concerned. If those acts, properly construed, declare that line to be the boundary, then, whatever may have been the reason for them, they establish it by their own force; and the rule referred to may have decisive effect as a fact in aid of their construction. A boundary line between the lands bordering east and west on the river was established by independent powers that then owned them, and were foreign to each other, before the United States acquired title to any of them. The international rule applied to the powers, and construed their description of that boundary to mean the line so claimed. After the United States, with notice of the line so established, acquired the title, Congress authorized the formation of states out of the lands, with a common boundary line between them, indicated by precisely the same description. From these facts, what other inference should be drawn than that Congress thereby intended precisely the same line. It would be as clearly ascertainable, as fixed, and, on the whole, as fair to the coterminous states as any other that has been suggested, and we see no reason that should have influenced Congress to change it.

We get no light upon this question from any of the decisions of the State or Federal Courts declaring the

boundary of these bordering states to be "the middle of "the river." That is a proposition which all sides alike profess to accept, but with different constructions. Whatever might be our view of it, if it were before us as an original question, we feel bound by those expressed in the Butternutt case, *supra*. Having considered with care all the suggestions of appellee's counsel with reference to its scope and effect as a decision, we cannot but regard it as conclusive upon us.

The evidence in the record fails to show that the middle line of the channel of commerce where the bridge crossed it was east of the east end of the draw.

For the reasons thus stated we are of opinion that the injunction should not have been granted. The order of the Circuit Court granting it will, therefore, be reversed and the cause remanded.

Reversed and remanded.

I, Geo. W. Jones, clerk of said Appellate Court, do hereby certify the foregoing to be a true copy of the opinion of said court in said cause, as the same appears from the records and files in my office.

In testimony whereof, I hereunto set my hand and the seal of said court, at Springfield, this seventh day of December, 1891.

GEO. W. JONES,
Clerk Appellate Court.

Seal of the Appellate Court, Third District. State of Illinois, July 1, 1877.

IN THE CIRCUIT COURT OF HANCOCK COUNTY, ILLINOIS.

Keokuk & Hamilton Bridge Company,
Complainants,
vs.
John W. Bertschi, County Treasurer and Ex-Officio Collector of Hancock County, Ill., and William M. Guthrie, Assessor of the Town of Montebello,
Defendants.
} *Affidavit.*

STATE OF IOWA, } ss.
LEE COUNTY. }

Albert Wempner, being first duly sworn, doth depose and say that he is a resident of Keokuk, Iowa, and has been engaged as Master and Pilot of steamboats on the Mississippi River most of the time since the year 1852; that he is entirely familiar with the Mississippi River at and near the city of Keokuk, Iowa, and was for many years prior to the building of the Keokuk and Hamilton bridge at that point; that before the building of said bridge the only channel in said river at or near the place crossed by said bridge along which vessels in the carrying trade did or could pass, was near the Iowa shore, the west line of said channel being where the pivot pier of said bridge now stands, and the east line of said channel at a point between three hundred and four hundred feet east of where said pier now stands; that the above described channel was the only channel at this point that could be or was used for the purpose of commerce on said river, the water east of said channel being too shallow in an ordinary

stage of water to be used by vessels engaged in the carrying trade; that the only change in said channel at said point, since said bridge was built, was made by artificial means, by blasting and removing the rock bed of the river and extending said channel westward to the west abutment of said bridge.

In witness whereof I have hereunto set my hand this 25th day of April, A. D. 1891.

ALBERT WEMPNER.

Subscribed and sworn to before me this 25th day of April, A. D. 1891.

ALANSON L. PARSONS,

[L. S.] *Notary Public in and for Lee County, Iowa.*

STATE OF ILLINOIS, } ss.
HANCOCK COUNTY. }

I, Thomas F. Dunn, clerk of the Circuit court within and for said county, in the state aforesaid, do hereby certify that the above and foregoing is a true copy of a certain affidavit made by Albert Wempner in a certain cause pending in said court wherein the Keokuk and Hamilton Bridge Company are complainants and John W. Bertschi, County Treasurer, etc., *et al.*, are defendants, and filed in said cause on May 4, 1891, as the same appears from the files in said cause now in my office remaining.

Witness my hand and the seal of said court at my office In the city of Carthage, in said county this 21st
A. D. 1893.

[SEAL.] THOS. F. DUNN,
Clerk.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa,
vs.
The State of Illinois.

STATE OF IOWA,
COUNTY OF LEE. } ss.

I, James W. Campbell, a licensed pilot, being duly sworn, do depose and and say as follows: I reside at Fort Madison, Iowa, and have resided there since 1863.

I have been familiar with the channel of the Mississippi River at Keokuk, Iowa, since 1831. Seven years of my early life was spent in an Indian canoe paddling up and down the shores at Keokuk during the summer months, and from this association I learned to be a pilot over the Rapids and on the upper Mississippi River, and have followed the said occupation from 1844 to 1871. Immediately above and below where the Keokuk and Hamilton bridge now terminates on the Iowa shore, the channel of the Mississippi river hugs the shore in a curvature line or course, and is from 4 to 600 feet wide. Outside of this distance on the east a boat is liable to strike rocks in several places in low water. I was on the steamer Tempest, and she struck these patches in March, 1847.

The Eliza Steward also grounded upon them in 1847 about 400 feet east of Iowa shore, about one hundred and fifty yards below where the Keokuk and Hamilton bridge now terminates on Iowa shore, and the steamer Dominion sank upon a rock about 600 feet east of Iowa shore near the crossing of the present Keokuk and Hamilton bridge in 1846 or '47. And I am positive there never was a regular or continuous channel, east of line 4 to 600

feet from the Iowa shore at or near where the Keokuk and Hamilton bridge now crosses the river.

J. W. CAMPBELL.

Subscribed and sworn to before me this 19th day of September, A. D. 1893.

[SEAL.] W. C. MARSH,

Notary Public in and for Lee County, Iowa.

IN THE SUPREME COURT OF THE UNITED STATES.

The State of Iowa }
vs.
The State of Illinois. }

State of Missouri, }
County of St. Louis. } ss.

I, Thomas B. McMath, being duly sworn, do depose and say as follows: I am a resident of the city of St. Louis, Missouri; I am a civil engineer, and have been for the past ten years, and am president of the R. E. McMath Surveying Company of St. Louis, Missouri.

On September 13, 1893, I made soundings of the Mississippi River at the place where the Keokuk and Hamilton bridge crosses that river, in order to ascertain the depth of water therein. These soundings were made and located as follows: Beginning at the west face of the east abutment of the bridge distances of fifty feet were measured along the hand-rail on the north side of the bridge, and from the points so located plumb lines were dropped and the soundings were taken from a boat at the plumb; at the time the soundings were made the water in the river was four-tenths of a foot above low-water mark. The plat annexed hereto was made by me,

William R. Hamilton, of Carthage, Illinois, being duly sworn, says: that he has resided in Hancock County, Illinois for the last 58 years, except about one year he was in Oregon.

That from 1856 to 1858 he resided at Hamilton in said County of Hancock, and with deponent's father, Artois Hamilton and deponent's brother, John D. Hamilton, (both now deceased) he was connected with the business of warehousing, and to some extent in the lumber trade on the Mississippi River at Hamilton. That they had for considerable time, a Warehouse on the river front, just south of the dyke, at which the ferry boat landed. At which Warehouse steamboats engaged in the ordinary river traffic were in the habit of landing and receiving and delivering freights. That the said Warehouse was burned about the year 1859 or 1860.

That deponent during the time he resided at Hamilton, was often on the river between the lower chain of the Des Moines Rapids of said river and a point considerably below the location of the present Keokuk & Hamilton Bridge, and thinks he is well posted as to the depth of water, below said lower rapid (chain) for a mile or more. That in the opinion of deponent, prior to the construction, by the Ferry Co. of its road from the main shore at Hamilton across Island No. 2, the dam across the slough between Islands No. 2 and 4, and dyke extending into the river from the tow head at the upper end of Island No. 4, any steam or other boat that could pass over the said rapids, could readily pass *at any point* in said river between the west shores of Islands No. 2 and 4 and the Iowa shore.

That deponent frequently saw steamboats, of the

largest class navigating said river from St. Louis to Keokuk and to St. Paul at the Wabash depot at the west shore of Island No. 4, receiving and discharging freight. That the same class of steam boats also landed at said Warehouse herein before mentioned, to receive and land freights.

WM. R. HAMILTON.

Subscribed and sworn to before me, October 28th, 1893.

G. EDMUNDS,
Comr. Circuit Court, U. S. for S. District of Illinois.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant*, *vs.* STATE OF ILLINOIS, *Defendant*. } No. 5 Original. Oct. Term, 1893.

State of Iowa, } ss.
Lee County, }

I, David Steeley, upon my oath, do state, that I am by profession a pilot of the Mississippi River, and have been for 29 years last past; that at present I am in the employ of the United States government as pilot on a government steamer engaged in river improvement between Keokuk, Iowa, and Ft. Madison, Iowa; that I have had many years experience in navigating the Mississippi River in the vicinity of Keokuk, Iowa, and Hamilton, Illinois, and am familiar with the location of the navigable channel of said river and the depth of water flowing in same; that prior to the construction of the Keokuk and Hamilton Bridge I was employed for seven years on the ferry line between Keokuk, Iowa, and Hamilton,

Illinois ; I was pilot on three diffenrt boats with that line, the Gate City, Toledo and Keokuk, the last named was a boat 140 feet long and 40 feet beam with two boilers and a pair of large engines ; she would carry forty-four loaded teams, besides passengers; we ran this boat at all stages of water until driven into winter quarters by ice; the ferry landing on the Illinois side at Island No. 4 was on the shore of Island No. 4 about 100 yards northerly from the east abutment of the Keokuk and Hamilton Bridge and about 700 feet east of the present location of that abutment. There was also a steamboat landing for the use of warehouses above the ferry landing about from 100 to 200 yards and loaded steamboats engaged in navigating the Mississippi River could land and did land at said depots for the purpose of receiving and discharging freight at all stages of water. The only obstruction to navigation between Keokuk, Iowa, and Hamilton, Illinois, were some iron chimneys of the steamer Louisiana, out from the Hamilton landing, that had been blown off the boat in a storm. These filled with sand and gravel and we used to avoid this obstruction, but otherwise the boats used to slant across from the Keokuk landing anywhere and landed on Island No. 4. At extreme low water no boats could load to more than a depth of 3½ feet and go up and down the river. In the extreme low water of 1864 very few boats ran at all; to my recollection no packets came into Keokuk at all during the lowest water of that year either from above or below. In 1891, during the low water, I was employed on a steamer owned in Keokuk, which was used to tow rafted lumber from Keokuk across to the Illinois shore at a point opposite the old ferry landing; there

was no difficulty in towing said lumber with said boat across to said point and I found five feet of water and more, all the way. The Keokuk landing was always shoal at low water; in 1891 boats hit the bed of the river at quite a distance from the shore.

D. C. STEELEY.

Subscribed and sworn to before me, by D. C. Steeley, this 28th day of October, A. D. 1893.

[SEAL] A. HOLLINGSWORTH,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA, *Complainant*, *vs.* STATE OF ILLINOIS, *Defendant*. } No. 5 Original. Oct. Term, 1893.

State of Iowa, } ss.
Lee County, }

I, David Tipton, upon my oath do say, that I am a citizen of Rock Island, Illinois; that since 1854 I have been a pilot on the Mississippi River, running between St. Louis, Mo., and St. Paul, Minn., and have been engaged in the business of piloting every season since that date; that I am now in the employ of the United States government, being pilot of the United States steamboat "General Barnard," now engaged as a snag boat in the improvement of the Mississippi River between the mouth of the Missouri River and City of St. Paul, Minnesota- I am familiar with the bed and channel of the Mississippi River at the point where same is crossed by the Keokuk and Hamilton Bridge, and have been familiar with the bed of said river and

channel since 1854. That the City of Keokuk is at what is known as the head of navigation in extreme low water; before the construction of the bridge in extreme low water ; and before the construction of the Des Moines Rapids canal in extreme low water boats were unable to navigate the Mississippi River above the City of Keokuk ; that prior to the location and construction of the Keokuk and Hamilton Bridge, about 1867, westerly the shore line of Island No. 4 was about 700 feet east of the easterly abutment of said bridge; that there was located upon said westerly shore of Island No. 4 a ferry wharf and landing and a steamboat warehouse and landing ; the ferry landing was used by large ferry boats which made daily trips from Keokuk, Iowa, to Hamilton, Illinois, such ferry boats running during all times of the navigable seasons; that the other steamboat landing and warehouse was used for the purpose of steamboats engaged in the ordinary navigation of the Mississippi River landing for the purpose of receiving and discharging freight; that during all times during navigable seasons of the Mississippi River, and except when navigation was prevented by reason of ice, all boats that could land at the City of Keokuk were able to cross the river and make the landing at Hamilton, Illinois, at the said warehouse and landing as then described on west bank of Island No. 4 ; that in my judgment there was a little more water and a better landing for steamboats on the Illinois shore at the point where the said wharf and warehouse is located, than there was on the Iowa shore; that the main channel of the Mississippi River before the construction of the Keokuk and Hamilton Bridge and before said channel was obstructed by artificlal means, was nav-

igable from the landing at Keokuk, Iowa, across to the landing on the west bank of Island No. 4 at Hamilton, Illinois. The bed of said channel is composed of solid rock, and a swift flowing current from the Rapids keeps same free from sand and other obstructions. That prior to the construction of the Keokuk and Hamilton Bridge the main channel of the Mississippi River from the west shore of Island No. 4 to the Iowa shore was navigable for boats engaged in commerce upon said river. That the ordinary boats engaged in navigating the Mississippi River can float in thirty inches of water and ordinary boats so used in navigation can pass over places in said river that have but thirty inches of water.

D. TIPTON.

Subscribed and sworn to before me, this 31st day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS.

State of Missouri, } ss.
St. Louis County. }

S. M. Ball, being by me first duly sworn, deposes and says, as follows:

I am a resident of the City of St. Louis, Missouri. Twenty four years of my life I followed the business of steamboat.nan, being in that time part owner of a

steamboat, and for a part of said time a licensed master and pilot on the Mississippi River. I am quite familiar with the Mississippi River between the the City of Keokuk, Iowa, and Hamilton, Illinois. As a pilot I took the steamer Enterprise into Hamilton Slough and know that before said slough was filled up on account of the building a railroad bridge across the same that both changed its course and narrowed it up, that the same was navigable at a fair stage of water. In November and December, A. D. 1881, during a time when the Keokuk and Hamilton Bridge was disabled, by reason of a collision with with the steamer War Eagle, I acted as master and pilot of on a very large and heavy ferry boat owned in St. Louis, and built for use there by the Wiggins Ferry Co., in transferring freight, teams, etc , at Keokuk, Iowa, crossing and re-crossing in regular trips just below said bridge. The boat drew six feet of water, and for part of the time landed at a point about 700 feet east of the east end of said bridge and along side the approach thereto. The rest of the time we landed against the east abutment of said bridge.

S. M. BALL.

Subscribed and sworn to before me, this 28th day of October, A. D. 1893.

[SEAL.] JAMES B. CLARK,
Notary Public.

My term expires March 16th, 1894.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Ohio, }
Hardin County. } ss.

Henry B. Whitney, being duly sworn, doth depose and say, as follows :

That for many years he was a licensed pilot and master of steamboats on the Mississippi River, and that during that time, to-wit: from 1879 to 1891, he was engaged at various times in piloting and managing vessels engaged in the improvement of said river, part of the time employed by the United States in piloting boats engaged in dredging and other work in the Des Moines Rapids Canal and the waters of the Mississippi river adjacent ~~adjacent~~ thereto, particularly at the lower entrance to said canal along the Iowa shore in the City of Keokuk, and that in dumping the material dredged from said canal and the entrance thereto he had occasion to pass through the draw of the Keokuk and Hamilton Bridge and cross the river immediately below said bridge more than 100 times, and that in crossing the river at all stages of the water he never found any obstructions nor any trouble in going anywhere necessary to dump said material in the sloughs on the Illinois shore or along the shores of the islands in Illinois. That he has crossed and re-crossed the the river repeatedly at a point about 400 feet east of the Iowa shore and about 150 yards below the above named bridge, with heavy tows and that he knows of no obstruction at that point nor anywhere near there

to the free navigation of the Mississippi River. That in the month of November, 1881, he was for a short time engaged as pilot and master upon a boat used to transfer material for repairing bridge, and that he landed a number of times at a point 700 feet east of the east end of the bridge, and that during the same time a very large and heavy ferry boat from St. Louis that drew from 5 to 7 feet of water made regular trips immediately below said bridge and landed at the same point.

H. B. WHITNEY.

Sworn to before me and subscribed in my presence, this 21st day of October, A. D. 1893.

[SEAL] WM. W. STEVENSON,
Notary Public, Hardin Co. Ohio.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS,

State of Illinois, }
Hancock County. } ss.

Frank Meyers, being by me first duly sworn deposes and says, as follows:

I am a licensed pilot on the Mississippi River, residing at Warsaw, Illinois. I have been engaged in the steamboat business since the year A. D. 1861. In going up the Mississippi River previous to the building of the Keokuk and Hamilton Bridge at Keokuk, Iowa, we would keep our boats about the middle of the river, and after passing Keokuk would run

as close to the Iowa shore as possible in order to save distance, as the river runs almost a circular course there.

FRANK MEYERS.

Subscribed and sworn to before me, this 26th day of October, A. D. 1893.

[SEAL] HENRY J. M. LUEDDE,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa, } ss.
Lee County. }

I, C. C. Carpenter, being first duly sworn, do depose and say, as follows:

I am a licensed pilot on the Mississippi River and reside at Lansing, Iowa. I have been licensed for the last 23 years. I also hold a master's license, and am in charge, at this date, of the tow boat Inverness and engaged in towing lumber in rafts down the Mississippi River. The stage of the water at Keokuk, Iowa, which is at the foot of the Des Moines Rapids in said river, as shown by the guages, is to-day at one foot and one half above extreme low water mark of 1864. At this stage of the river, boats nor rafts cannot be brought over the rapids, but are compelled to come down through the Des Moines Rapids canal.

For these reasons lumber that is designed for points in Illinois opposite Keokuk, Iowa, is brought through the canal and down through the pivot span of the

Keokuk and Hamilton Bridge, to where there is good water and taken across the river below said bridge and landed on the Illinois shore, and upon this 23d day of October, 1893, I not only brought a raft out in the manner described above but pushed it across the river and up through the east span of said bridge finding but very little, if any difference, in the water in crossing the river in this way. The river bed above said bridge for a considerable distance is comparatively level, with a smooth rock bottom, except where here and there in a soft spot the rock has been worn into a hole. Along the Illinois shore, that is to say, the west banks of the Islands opposite Keokuk there is a sort of a "gut" where the water is deeper than along the Iowa shore.

C. C. CARPENTER.

Subscribed and sworn to before me, this 23d day of October, A. D. 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa, }
Lee County, } ss.

William Dobler, being by me first duly sworn, deposes and says, as follows:

I am a resident of Sumner, Washington, and am licensed as a pilot to run on the Mississippi River since 1876. At this time I am employed as a

pilot upon the tow boat Inverness, and engaged in bringing rafts of lumber down the Mississippi River. When the water is very low, as it is now neither boats nor rafts can be brought over the Des Moines Rapids of the river, which rapids end at Keokuk, Iowa. Everything is then brought through the Des Moines Rapids canal. On this 23d day of October, the above named boat, in tow of a raft, brought the same down through said canal, then on down through the draw of the Keokuk and Hamilton Bridge, a short distance below, said canal, to where there is good water, immediately below said bridge, and then pushed said raft across the river just below the bridge and up through the east span of said bridge, finding about the same stage of water clear across and just as good under the east span as the pivot span of the bridge.

WILLIAM DOBLER.

Subscribed and sworn to before me, this 23d day of October, A. D. 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES:

STATE OF IOWA,
vs.
STATE OF ILLINOIS.

State of Iowa, }
Lee County, } ss.

W. H. Jones, being by me first duly sworn, deposes and says as follows:

I am a resident of Keokuk, Iowa; by profession a Civil Engineer and am now and for two years past

have been the City Engineer for said city, and have in my charge the maps, profiles, etc, pertaining to the original surveys of said city. On this, the 24th day of October, 1893, I took the necessary measurements to determine the shore line at Keokuk, Iowa, opposite the west end of the Keokuk and Hamilton Bridge. I have read the affidavit of H. S. Brown, made on the 19th day of September, 1893; made for use of the State of Illinois on the motion to set aside the order confirming the report of the Commissioners in fixing the boundary line between the States of Iowa and Illinois, in which he states that the deepest water was 250 feet from the Iowa shore line. And I find by careful measurements that at a point 250 feet from the Iowa shore line there is at this date with a stage of 1.4 feet above low water no water at all at that point and that it would be necessary to go at least 50 feet further to reach the west abutment of said bridge, and about 75 feet still further to reach the centre of the channel blasted out of the rock by the United States so as to form a channel from the pivot span of said bridge to the entrance to the Des Moines Rapids Canal.

I have also read the affidavit and examined the profile made by Thomas B. McMath on September 20th, 1893, in the same case as noted above, and on this 24th day of October, 1893, with the water at a stage of 1.4 feet above low water and 1 foot above the stage indicated upon the profile noted above, have taken soundings in the river at the following points to wit; at the point on the said profile noted as station 1400 and find that there is 7.5 feet of water over the bed of the river but only 2.5 feet on the old pier immediately under that point and on which the soundings noted on said profile must have been taken.

Going up the river from where the deepest water is indicated upon said profile I took soundings for 300 or 400 feet finding about 6.5 feet of water. At the point indicated upon said profile as "Commissioners mark" I found from 6′ to 6.5′ to the bed of the river.

Although the sand has formed a bar there that leaves but 4 to 5 feet above the sand. I noticed that east of this point and directly under said bridge the water was about the same, perhaps a few inches deeper: i. e. 6.5 to 6 to 7 feet over the bed. Below the pier right at the state line there is a large deposit of rock thrown in around said pier which caused the bar to form.

W. H. JONES.

Subscribed and sworn to before me, this 24th day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA,
vs.
STATE OF ILLINOIS,

State of Iowa, }
Lee County. } ss.

1, W. S. Sample, being duly sworn, do depose and say as follows:

I am a resident of the City of Keokuk, Iowa, and have lived in or near said city for more than 40 years. Previous to the year 1871 I was engaged in the ferrying business between Keokuk, Iowa, and Hamilton,

Illinois and was constantly crossing and recrossing the Mississippi River at or near the place now occupied by the Keokuk and Hamilton Bridge with a large and heavy ferry boat. Part of that time there was a warehouse known as the Hamilton Warehouse on the Illinois shore of the island opposite Keokuk and about 1500 feet above the east end of the above named bridge and from 500 to 700 feet east of the east end of said bridge, to which I have gone repeatedly for merchandise, etc., and to which I have seen a great many times, the steamboats plying the river land, it being one of the regular landings of the Mississippi River. That in later years and previous to the building of said bridge, the Wabash Railroad had a warehouse about 700 feet east of the east end of said bridge, to which steamers of ALL classes made regular trips. That leading out from this warehouse into the river immediately above the east approach to said bridge a pier was built so that the railroad tracks could be extended into the river to take off the heavy freight to or from the boats and that all of the heavy stone used in the basement story of the Capitol Building at Springfield, Illinois was quarried a few miles above this point in Illinois, and brought to this pier to be loaded into cars, etc That I have crossed and recrossed the Mississippi River both above and below the said bridge more than 500 times upon steamers, ferry boats, etc., and that I always found it navigable at any stage of water and that the same is navigable at the extreme low water mark of 1864 from a point 500 or 600 feet east of the east end of said bridge to a point 200 to 250 feet west of the west end of said bridge if the artificial obstructions are removed. That from his acquaintance with the Mississippi river and from a long experience and

observation he knows that there is nothing about 400 feet east of the Iowa shore and 150 yards below the Keokuk and Hamilton Bridge that is an obstruction to navigation or that has ever prevented boats of all classes from crossing or recrossing the river at that point or anywhere between there and the bridge above.

That he has repeatedly seen boats cross and recross the river both above and below said bridge since it was built, in towing lumber, willows and the fleets of the United States in taking dump boats from the Des Moines Rapids Canal. That for a long distance above said bridge, the river bed is one unbroken ledge of rock comparatively level, with an occasional pocket or hole where the rock was probably softer than at other places. That below said bridge the rock very soon disappears and much deeper water is found. That Keokuk is situated upon a point or promitory around which the river runs in almost a complete semi-circle and that boats in going up or down the river and not having to land at Hamilton, Illinois, would as a matter of economy both of time and of fuel keep in as close as possible to the Iowa shore on the inside of the circle, but that from my knowledge of the river that was not necessary except as noted above.

In witness whereof I have hereunto set my hand this 24th day of October, A. D., 1893.

W. S SAMPLE.

Subscribed and sworn to before me this 24th day of October, A. D., 1893.

[SEAL.] WM. J. SCHLOTTER.

Notary Public in and for Lee Co., Iowa.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa,)
Lee County,) ss.

John C. Daniels, being by me first duly sworn, depc ses and says, as follows:

My residence is Keokuk, Iowa, and my business that of a steamboatman, engaged in towing rafts of lumber and logs down the Mississippi River. I have been engaged in this business since 1867, and am the owner of two steamboats, which I use for the above purposes. Whenever there is a low stage of water neither boats nor rafts can navigate the Des Moines Rapids of the Mississippi River, but are brought through the Des Moines Rapids canal. I frequently sell or contract for the delivery of lumber at Hamilton, Illinois, opposite the City of Keokuk, Iowa, and whenever the stage of water prevents coming over the rapids with safety, I have brought the rafts down through the canal and taken them across the river just below the Keokuk and Hamilton Bridge and landed them against the west bank of the islands, either below the east end of said bridge or pushed them up through the east span of said bridge as far as possible for the smoke stacks of my boat, as the bridge is a low bridge, with its draw span on the Iowa side. In the summer of A. D. 1892, when the water was extremely low, I took some very long and heavy cribs of lumber across to the Illinois side with a boat that conld run under the bridge and on this occasion I ran up through the bridge in a quartering

direction and landed them above the east end of said bridge about 900 to 1200 feet and from 400 to 600 feet east of its end. I know that there has been good water for navigation for a long distance above said bridge in Illinois, and before artificial means had changed the condition it was as good as along the Iowa shore.

JOHN C. DANIELS.

Subscribed and sworn to before me, this 25th day of October, 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa, }
County of Lee, } ss.

I, John Smith, being first duly sworn, do depose and say, as follows:

I am a citizen of Iowa, and have resided in the City of Keokuk for the last 38 years. My business is that of a fisherman in the Mississippi River, and in following that business for about 18 years, I have become familiar with every part of the river between Keokuk, Iowa, and Hamilton, Illinois, as I have frequent occasions to pass and repass over every part of same in setting nets, anchors, &c., &c., at all stages of the water. For a considerable distance both above and below the Keokuk and Hamilton Bridge, the river bed is almost one unbroken bed of rock, ex-

cept where here and there a soft spot has been worn into a hole or pocket. The deepest water under said bridge being one of these holes, which is very narrow and disappears as you go directly up or down the river. Before said bridge was built the been of the river washed off clean and and smooth from shore to shore, but since the building the bridge and the approach thereto, considerable filling has taken place and occasionally forms a sand bar for only a short time, usually above some of the piers to the bridge. I know there is no ledge of rock, nor any other obstruction to navigation about 400 feet east of the Iowa shore and 150 yards below said bridge, nor any where between that point and said bridge that would prevent the free navigation of said river between Island No. 4 in Illinois, and the main bank in Iowa. I have seen the packet steamboats that ply the river land at Island No. 4 near the old Wabash depot about 700 feet east of the east end of the said bridge a great many times before the bridge was built, and have seen them as many more times land at the old Hamilton warehouse about 1300 or 1400 feet above said bridge, and about 700 or 800 feet east of the east end of said bridge. I know there is good water all along the shore of the Island above said bridge and that boats go in there very frequently with lumber, or for willows from the island, and that at a very low stage of water.

JOHN SMITH.

Subscribed and sworn to before me, this 23d day of October, A. D. 1893.

[SEAL] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa, }
Lee County. } ss.

Jacob Heinz, being by me first duly sworn, deposes and says, as follows:

Commencing with the year 1859 I was employed in various ways upon the steam boats that run upon the Mississippi River between St. Louis, Mo., and St. Paul, Minn., for many years, and for a considerable time was engaged on the ferry boats that ran between Keokuk, Iowa, and Hamilton, Illinois. I am very familiar with the landings in Illinois, opposite the City of Keokuk, and know that the largest steamers that came to Keokuk were in the habit of going to the old Hamilton warehouse about one-half mile above the east end of the Keokuk and Hamilton Bridge, and of going to the depot of the Wabash Railroad which was built in later years on or near the west bank of Island No. 4, or 600 to 800 feet east of the east end of said bridge, and that this was done whenever there was freight to load or unload, and at any stage of water that these boats could get to Keokuk from the south.

JACOB HEINZ.

Subscribed and sworn to before me, this 24th day of October, 1893.

[SEAL] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,

vs.

THE STATE OF ILLINOIS.

State of Iowa, }
Lee County, } ss.

Henry Conn, being first duly sworn, doth depose and say, as follows:

That he is a citizen of Keokuk, Iowa, and has resided there for years. That during the years 1868 to 1871 he was employed upon the ferry between Keokuk, Iowa, and Hamilton, Illinois, and became well acquainted with the Mississippi River between these two points. That previous to the building of the Keokuk and Hamilton Bridge there was a warehouse belonging to the Wabash Railroad Co., located about 650 to 750 feet east of the east end of the Keokuk and Hamilton Bridge, to which boats of all classes went, at all stages of water, to receive and discharge their loads. That afterwards a pier was built from this warehouse out into the river just above what is now the east approach to said bridge, and that boats landed alongside of this to take on and put off the heavy freight that was not taken into the warehouse. At this point I saw the heaviest kind of stone loaded into cars to be taken to Springfield, Illinois. I think I have crossed the river both above and below the Keokuk and Hamilton Bridge not less than 1000 times, and I never saw any obstruction nor heard of any about 400 feet east of the Iowa shore and about 150 yards below the bridge, nor between that point and the bridge, that would prevent the

free navigation of the river from bank to bank. Since the Des Moines Rapids Canal was built I have seen the tow boats with their tows come out of the canal and cross the river below the bridge in all sorts of ways and in all stages of the water. The bed of the river above said bridge is nearly level, with occasional holes, where a soft spot is found in the rock bottom, but perhaps 500 to 600 feet below the bridge the rock shelves off and the water grows deeper.

HENRY CONN.

Subscribed and sworn to before me, this 24th day of October, A. D. 1893.

[SEAL] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS.

State of Iowa, } ss.
Lee County. }

Jacob Schlotter, being by me first duly sworn, deposes and says, as follows :

I reside at Keokuk, Iowa, and fro.n the fall of 1858 to 1869 was engaged in various capacities upon the steamboats running on the upper Mississippi River from St, Louis, Mo., to Keokuk, Iowa.

The boats that I served on were the Warsaw, Lucy Bertram, Andy Johnson, &c., being the largest boats that ran above St. Louis. I am familiar with the location of where the Hamilton warehouse and afterwards where the Wabash Railroad depot stood

on the west banks of the Islands opposite Keokuk, and know that the boats I have named above, as well as others upon which I served went to these warehouses at any stage of water when we got to Keokuk.

JACOB SCHLOTTER.

Subscribed and sworn to before me, this 25th day of October, A. D. 1893.

[SEAL] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS,

State of Iowa, }
County of Lee. } ss.

I, Charles Bartlett, a citizen of Hamilton, Illinois, being duly sworn, do depose and say, as follows:

I am a civil engineer by profession, but for the last four years have been engaged in the lumber business in Hamilton, Illinois, and that all or nearly all the lumber bought for our business is brought down the Mississippi River in rafts. That at a good stage of water it is brought down Hamilton Slough, and landed on the main shore in Illinois, in the City of Hamilton.

That at other times, it is brought down through the Des Moines Rapids Canal, and then brought across the river and landed along the shores of the islands between said slough and the main arm of the

river. That in September, 1891, when the stage of water in the river was three to five inches below the low water mark of 1864—which is the government standard for reference— and when no boats could navigate the river above the Keokuk and Hamilton Bridge, except by going through the Des Moines Rapids Canal, I had rafts brought down through said canal and below said bridge and from there towed across the river and up through the east span of said bridge to where there was a convenient place for pulling said rafts, and loading the lumber on wagons to haul to my yards. That I found sufficient water immediately above said bridge along the west bank of the island, but that from 300 to 900 feet above said bridge the water was still deeper and better for my purposes. I have repeated this three or four times in low water, but not when it was quite so low as the time mentioned, but when that was the only way of getting the lumber over the Des Moines Rapids.

CHARLES BARTLETT.

Subscribed and sworn to before me, this 31st day of October, A. D. 1893.

[SEAL.] WILLIAM J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

STATE OF IOWA,
vs.
STATE OF ILLINOIS, } Original.

State of Iowa, }
Lee County } ss.

H. R. Dickinson being by me first duly sworn doth depose and say as follows:

I am a citizen of Hamilton, Illinois, and have re-

sided there for the past 43 years. During all this time I have been familiar with the Mississippi River between Hamilton, Illinois and Keokuk, Iowa; part of the time I was engaged in the ferry business between these towns.

I know that steamboats often landed at the old Wabash Depot on Island No. 4, and received and discharged freight, as well as at a warehouse owned by Hamilton, about ¼ mile north east from said Wabash depot. Said Wabash Railroad had its depot on Island No. 4, about 700 feet east of the east end of the Keokuk and Hamilton Bridge, from which it received and delivered to steamboats freights for 10 or 12 years and until said bridge was built. From this warehouse a pier or dyke was built out into the river 600 or 700 feet and just above the east approach to said bridge so that heavy freights could be handled directly to and from the cars and boats, and from the south side of said pier was shipped the stone for the basement story of the Capitol at Springfield, Illinois, which were quarried a few miles up the river in Illinois, and brought here on boats for shipment. At present and for some years past I have been in the lumber business and buy most of my lumber in rafts and bring it down the river in that way. When there is a good stage of water I have it brought down over the rapids and delivered in Hamilton slough, and pull it on the main shore in Hamilton. This slough has been navigable in times past for quite large boats and some 38 years ago a packing house stood on its eastern shore to which boats came to receive and discharge freight. Since the Wabash Railroad bridge was built across it, the course was changed and the waterway made so narrow that it has since filled up a great deal.

Whenever the river has been too low to bring rafts over the rapids I had them brought down through the Des Moines Rapids Canal, and then taken below the bridge above named, and towed accross by steamer just below it to the east span of said bridge and brought up under that span a distance of from 100 to 1500 feet in the water along the west bank of the island above the bridge, and there I find water deep enough for any ordinary steamboat and for my purposes. On the 23d to 25th of October, 1893, with a stage of water from 1-3 to 1.5 feet above low water I was receiving lumber in this way.

I have crossed the river over 500 times above and below said bridge and know of no obstruction about 400 feet east of the Iowa shore, and about 150 yards below said bridge that would prevent the free navigation of said river from bank to bank, nor do I know of any obstruction between that point and the bridge that would interfere with any steamboat.

I have in very recent years seen the fleets of the United States Engineer Corps, that were engaged in dredging the Canal, cross or recross below said bridge, going to the sloughs on the Illinois side, or to the shore, or just below the bridge to dump their loads, and never knew nor heard of one having any trouble in going any where below said bridge. I know that a few years since one of the piers under said bridge, near where the state line has been marked was moved by the ice, and that the Bridge Company threw in a great lot of rock to hold it against further trouble.

I also know that some 350 feet west of this point the Bridge Company put in a wooden pier or crib and that the bottom part of it is still there. My opin-

ion is that from the time I settled in Hamilton, and until the Ferry Company constructed its road accross Islands Nos. 2 dammed the slough between Islands Nos. 2 and 4, and extended a dyke some 300 feet into the river, that any steamboat that could go up or down the rapids, could pass over any part of said river between the Iowa shore and the west banks of Islands Nos. 2 and 4, and have more water than on the rapids, The construction of said road, dam and dyke by the Ferry Company to a considerable extent changed the course of the current towards the west side of the river and as I believe caused deposits of sand and silth below said dyke where before the bottom of the river was a smooth flat rock, with an occasional hole worn by the ice and other agencies.

H. R. DICKINSON.

Subscribed and sworn to before me this 1st day of November, A. D., 1893.

[SEAL.] WM. J. SCHLOTTER,
Notary Public.

IN THE SUPREME COURT OF THE UNITED STATES.

THE STATE OF IOWA,
vs.
THE STATE OF ILLINOIS.

State of Missouri, } ss.
St. Louis County. }

Charles S. Whitney, being first duly sworn, deposes and says, as follows:

I reside in the City of St. Louis, Mo. For many years I was employed in contract work under the United States Engineer corps for the improvement of the Mississippi River, part of the time as an employee, but for seven years as a principal, and part owner of a fleet of steamboats, dredge boats, &c.,

adapted to that business. I am familiar with the Mississippi River between Keokuk, Iowa, and Hamilton, Illinois, and for 10 or 12 miles above where the Keokuk and Hamilton Bridge crosses said river, which part of the river is known as the Des Moines Rapids, and which were improved and made passable in low water by the building of the Des Moines Rapids Canal, on which improvement I was engaged for six years, and through my connection with this work and a study of the maps, profiles, &c., connected with the "rapids" and prepared by the U. S. Engineer Corps, and my experience in operating boats over these rapids, I became well acquainted with the river. whole mentioned above. The bed of the river for a long distance above the said bridge is practically one unbroken ledge, nearly level, with the same stage of water from bank to bank, and with here and there a hole worn by the ice or other cause. Perhaps a mile above said bridge is a chain of rock, through which the U. S. blasted a channel many years ago, and before the building of the canal. This channel is a little nearer the Iowa than the Illinois shore, and in low water boats kept in as close as possible to the Iowa shore in order to save distance and to strike this blasted or made channel. From having gone innumerable times across the river between the above named towns I know there is nothing to prevent any ordinary boat that can reach Keokuk, from navigating said river from the west banks of the Islands in Illinois to the Iowa shore.

CHARLES S. WHITNEY.

Subscribed and sworn to before me, this 1st day of November, 1893. Witness my hand and notarial seal hereunto set and affixed.

My term expires January 27th, 1897.

[SEAL] H. Y. SHERWOOD,

Notary Public in and for the City of St. Louis, Mo.

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